IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	NO. 22474
Appellant,	)	
-vs-	)	
HUGH BRYSON,	)	
Appellee.	)	

BRIEF FOR APPELLEE

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IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA, Appellant, -vs- HUGH BRYSON, Appellee.	NO. 22474

BRIEF FOR APPELLEE

STATEMENT OF THE CASE

In 1955, appellee was convicted of having falsely denied, in an affidavit required to be filed by Section 9(h) of the Labor Management Relations Act of 1947 (29 USCA 159[h]), that he was then "affiliated" with the Communist Party.[1] He was

[1] The original indictment was in three counts: (a) that appellee had falsely denied that he entertained a personal belief in the forcible overthrow of the government--this was abandoned by the prosecution before trial; (b) that he falsely denied that he was a member of the Communist Party--on this he was acquitted by the jury; (c) the "affiliation" count--on this, although the jury found him guilty, it apparently had serious doubts as to the meaning of the count (see Order Setting Aside Conviction and Sentence, typewritten Opinion, p. 9, l.25, et seq)

because of the failure of several of the justices to participate, did not muster a majority of the court.[2/]

(2) In 1959, section 9(h) was repealed; contemporaneously, section 504 of the Labor Management Reporting and Disclosure Act of 1959 (29 USCA 504) "was enacted to replace" it. United States v. Brown, 381 U.S. 437, 439 (1965).

(3) In 1965, section 504 was held unconstitutional as a bill of attainder in an opinion, United States v. Brown, supra, which said (381 U.S. at 460) that the court in Douds has "misread" an earlier bill of attainder case (United States v. Lovett, 328 U.S. 303 [1945]), and strongly suggested (381 U.S. at 447) that Douds had departed from the "spirit" in which the bill of attainder clause had been "consistently interpreted". The four dissenting justices in Brown were in no doubt that the majority opinion there "obviously overruled" Douds, 381 U.S. at 464.

It has been mentioned that Bryson, in the years following his release on parole in 1959, paid $2,000 of the $10,000 fine. Late in 1966, the Government caused to be issued, in the original criminal case proceedings, a subpoena duces tecum requiring Bryson to attend at a designated time and place for the taking of his deposition. He was subjected

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2/ The issue of whether the word "affiliation" was void for vagueness was especially troublesome. See 339 U.S. 412-413, 420*, n.2.
*(". . .The dubious scope of the term 'affiliated'") 436, 439, 451.

to a thorough and detailed examination of his assets and liabilities, income and expenses, income tax return for 1965, andthe potential value of inchoate interests acquired in real property transactions in which he had acted as a licensed real estate salesman (See deposition of Hugh Bryson, December 16, 1966, filed in United States v. Bryson, Criminal No. 34105). The Government sought various assignments of these assets, "to be applied in satisfaction of the fine in United States v. Bryson, Criminal No. 34105" (letter, December 19, 1966, from Peter V. Shackter, Assistant United States Attorney, to Richard Gladstein, attorney for appellee), and subsequently "commenced steps toward levying" on one parcel of land (letter, January 27, 1967, from Shackter to Gladstein). In May, 1967, the Government filed a civil complaint, seeking judgment for $8,000 and costs (United States v. Bryson, Civil No. 47080). Following Bryson's institution of the proceedings below, efforts to enforce collection were discontinued, upon a written stipulation conditioned to the outcome of Bryson's petition (Stipulation and Order, No. 46116).

The proceedings below were begun in 1967, when Bryson filed, in the district court, a "Motion for Writ of Error Coram Nobis to Vacate, Set Aside and Correct Judgment of Conviction and Sentence of Imprisonment and Fine, and for Other Requested Relief." He alleged that the district court had jurisdiction under the "All Writs Section" of the Judicial Code (28 USCA 1651[a]) (R. 4), as well as under 28 USCA

2255. [3 /]

After a hearing on the merits, the district court ordered that his conviction and sentence be set aside, that he be released from parole, and that he be relieved of the remaining portion ($8,000) of his fine.

JURISDICTION

The jurisdiction of the district court squarely rested on either or both 28 USCA 1651(a) and 28 USCA 2255. The jurisdiction of this court over the appeal rests upon 28 USCA 1291.

STATUTES INVOLVED

All of the statutes involved in this proceeding are quoted in the Government's brief, save and except the All Writs section, which reads as follows:

> "§1651. Writs.
> (a). . .all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." (28 USCA 1651[a])

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3 / The Government writes its brief as though the All Writs statute is no part of this case. As will later be seen, the district court relied on the All Writs statute as an alternative ground of jurisdiction (R. 80).

SUMMARY OF ARGUMENT

1. As a result of his conviction and sentence, and his inability to pay the remaining portion of the fine imposed, Bryson is still required to report monthly to a probation officer, is subject to the supervisory powers of a parole officer, may not travel outside the State without permission, and may not vote or obtain a passport. These restraints are sufficient to constitute custody within the meaning of 28 USCA 2255 and to give the district court jurisdiction of this action under that section. Jones v. Cunningham, 371 U.S. 236 (1963); Carafas v. LaValle, 391 U.S. 234 (1968); Hoptowit v. United States, 274 Fed. 2d 936 (9 Cir., 1960); United States v. Dimario, 246 F. Supp. 786 (ED, Mich., 1965).

Alternatively, the district court had jurisdiction, without regard to the question of custody, under 28 USCA 1651(a)--the "all writs section". United States v. Morgan, 346 U.S. 502 (1954); Migdal v. United States, 298 F. 2d 513 (9 Cir., 1961).

2. Bryson had standing to challenge section 9(h) as an unconstitutional bill of attainder. Dennis v. United States, 384 U.S. 855 (1966), upon which the Government relies, is distinguishable because the defendants in that case had forfeited their right to assert the challenge, due to their participation in a conspiracy to engage in a fraudulent

course of conduct to conceal their undenied membership in the Communist Party. Here, the conviction of the substantive offense of stating that he was not "affiliated" with the Party when the jury found (with some misgivings as to the meaning of the word) that he was, is of an entirely different character and does not result in a forfeiture of his standing to make the challenge.

Alternatively, the Dennis case is distinguishable for there the attack came on direct appeal from the conviction. Here, Bryson is invoking post-conviction remedies which are always available for precisely such a challenge as he now makes. Sunal v. Large, 332 U.S. 174 (1947); Fay v. Noia, 372 U.S. 391 (1963); Sanders v. United States, 373 U.S. 1 (1963).

3. Section 9(h) was unconstitutional as a bill of attainder, since it was a retroactive act which imposed punishment upon an easily ascertainable class without a judicial trial. Ex parte Garland, 4 Wall. 356 (1867); Cummings v. Missouri, 4 Wall 333 (1867); United States v. Lovett, 328 U.S. 303 (1945).

It was also unconstitutional as a deprivation of rights guaranteed to Bryson by the First Amendment to the Constitution. Keyishian v. Board of Regents, 385 U.S. 589 (1967); Elfbrandt v. Russell, 384 U.S. 11 (1966); Dombrowski v. Pfister, 380 U.S. 479 (1965); Aptheker v Secretary of

State, 378 U.S. 500 (1964), and Scales v. United States, 367 U.S. 203 (1961).

4. It is appropriate to apply to Bryson's case the principles of United States v. Brown, supra, and the other bill of attainder cases, as well as the principles of Keyishian, supra, and the other First Amendment cases, because the problems which are believed to arise from a retroactive application of Keyishian do not exist here. There is no danger of mass relitigation, nor would there be any occasion for retrial here. The holding in appellee's favor terminates this litigation once and for all.

ARGUMENT

1. THE DISTRICT CORT HAD JURISDICTION TO HEAR AND DETERMINE THE PETITION TO SET ASIDE APPELLEE'S CONVICTION AND SENTENCE

The Government argues (Br. 6) that, because Bryson was not "in custody", the district court was without jurisdiction to proceed under 28 USCA 2255. The argument fails to appreciate the full significance of the cases which have broadened the "in custody" concept, and ignores the alternative basis upon which the district court asserted jurisdiction: e.g., 28 USCA 1651(a).

(a) Bryson was under sufficiently significant restraint to constitute custody and thus to give the district court jurisdiction under 28 USCA 2255

The Government recognizes that "from an early view that only institutional confinement would suffice. . .the meaning [of 'in custody'] has broadened to encompass restraint under parole or probation" (Br. 6). It argues, however, that Bryson's status in May of 1967, when the petition was filed, did not qualify even under the broader meaning of custody.

(i) The record.

The petition (R. 3-4) alleges that, by virtue of Bryson's inability to pay the entire fine, "the said period of parole [has] continued in effect"; and that as a result he remains "under the supervision" of a probation officer, that he is "required" to make monthly reports to said officer, that he cannot travel outside of California without first securing permission from the probation officer, and that he is "subject at all times to the supervisory parole powers" of the probation officer.[4/]

These allegations were not denied by the Government, and the district court found them to be true:

> "Petitioner is presently on parole and a substantial part of his fine ($8,000) remains unpaid. Consequently, his parolee status

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4/ It also alleges that, as an additional concomitant of the conviction, Bryson has been deprived of his right to vote and to obtain a passport (R. 4).

> continues with its attendant restrictions on his personal freedom. He must make monthly reports and must seek permission to travel outside the state. He is unable to vote." (R. 78)

This finding of the district court is not, nor could it be, assailed as "clearly erroneous", F.R.C.P., Rule 52. It is therefore to be accepted by this court.

The Government argues, however, that despite these restraints, Bryson may not utilize the procedures of section 2255. The argument is that, while the Board of Parole "continued to assert jurisdiction over Bryson after 1963", it could not "imprison him from, for example, the date he filed his present petition until this matter is decided" (Br. 8). This confusing statement appears to be inconsistent with the authorities cited in appellant's footnote 7, particularly United States v. Gottfried, 197 F. 2d 239 (2 Cir., 1952), which holds that the jurisdiction of the parole board continues "until the fine is paid or otherwise discharged" (at 241). Compare 18 USCA 3535: the issuance of execution shall not discharge the defendant from imprisonment "until the amount of the judgment is paid"; and see Panno v. United States, 203 F. 2d 504, 509-510 (9 Cir., 1953), and Callahan v. United States, 371 F. 2d 658, 661 (9 Cir., 1967). In any case, the Government recognizes (note 7) the additional possibility that Bryson might be proceeded against by way of contempt.

It is submitted that the restraints on Bryson's liberty found to exist by the district court, as well

as those further possibilities suggested by the Government itself, place Bryson "in custody" for the purpose of permitting him to invoke, and the district court to exercise, jurisdiction under section 2255.

(ii) The law.

In Jones v. Cunningham, 371 U.S. 236 (1963), the Supreme Court held that a state prisoner on parole was sufficiently restrained of his liberty to be able to invoke the jurisdiction of the federal courts under 28 USCA 2241. 5/

> ". . . . in fact, as well as in theory, the custody and control of the Parole Board involve significant restraints on petitioner's liberty because of his conviction and sentence, which are in addition to those imposed by the State upon the public generally. Petitioner is confined by the parole officer to a particular community, house, and job at the sufferance of his parole officer. He cannot drive a car without permission. He must periodically report to his parole officer, permit the officer to visit his home and job at any time, and follow the officer's advice." (Jones v. Cunningham, supra, at 242).

The restraints upon Bryson's liberty to do and go as he pleases are in no substantial way different from those imposed in Jones. Bryson's duty to report monthly

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5 / Both 28 USCA 2241 (dealing with habeas corpus for state prisoners) and 28 USCA 2255 use the identical words "in custody". The two sections have been similarly construed, and "in custody" means the same in each of them. United States v. Hayman, 342 U.S. 205 (1952); Matysek v. United States, 339 F. 2d 389, 394 (9 Cir., 1964).

and to secure permission to travel outside the state are restraints sufficient to constitute "custody". Compare Hoptowit v. United States, 274 F. 2d 936, 938 (9 Cir., 1960) and United States v. DeMario, 246 F. Supp. 786, 787 (ED, Mich., 1965) (both cases arising under section 2255). For a recent further expansion of the "in custody" concept in still another context, see Peyton v. Rowe, 391 U.S. 54, 64, 67 (1968), and United States v. Myers, 394 F. 2d 619 (3 Cir., 1968); and compare the restrictions on Bryson's liberty with those found in Carafas v. LaValle, 391 U.S. 234 (1968) to be sufficient to sustain jurisdiction under the habeas corpus statute.

> "It is clear that petitioner's cause is not moot. In consequence of his conviction, he cannot engage in certain businesses; he cannot serve as an official of a labor union for a specified period of time; he cannot vote in any election held in New York State; he cannot serve as a juror. Because of these 'disabilities or burdens [which] may flow from' petitioner's conviction, he has 'a substantial stake in the judgment of conviction which survives the satisfaction of the sentence imposed on him.' Fiswick v. United States, 329 US 211, 222, 91 L.Ed 196, 203, 67 S Ct 224 (1946). On account of these 'collateral consequences', the case is not moot. Ginsberg v. New York, __US__, ___n.2, 20 L.Ed. 2d 195, 200, 88 S Ct. __(1968); Fiswick v. United States, supra, at 222, n. 10, 91 L.Ed. at 203; United States v. Morgan, 346 US 502, 512-513, 98 L. Ed. 248, 257-258, 74 S.Ct. 247 (1954)." (Carafas v. LaValle, 391 US at 237-238)

(b) Apart from the question of custody, the district court had jurisdiction under 28 USCA 1651(a).

The Government ignores altogether this alternative

basis of jurisdiction, although Bryson's petition was expressly captioned as a motion for a "Writ of Error Coram Nobis" (R. 1) and 28 USCA 1651(a) was specifically pleaded as a basis for the district court's jurisdiction (R. 4). In fact, the district judge particularly found and concluded[6/] that jurisdiction rested alternatively on 28 USCA 1651(a) (R. 80).

The district court's discussion of this issue appears in its Order, at pages 80-81, of the record. The Government apparently has let the point go by default, for its brief nowhere considers it. We assume it is unnecessary for us to add more than a brief observation to the district court's discussion of the matter.

Plainly, "custody" is not a prerequisite to relief under section 1651(a), United States v. Morgan, 346 U.S. 502 (1954); Migdal v. United States, 298 F. 2d 513, 515 (9 Cir., 1961), and that under that section the district court possessed jurisdiction to hear and determine Bryson's claim upon the allegations of the petition (R. 8-9) that the law was changed after Bryson's time for a direct appeal had expired. See Sunal v. Large, 332 U.S. 174, 181 (1947).

And the fact that the prison sentence has been completely served, is likewise no basis for denying relief,

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6 / The court directed that its 16-page typewritten "Order Setting Aside Conviction and Sentence" (R. 77-92) "constitutes the court's findings of fact and conclusions of law" (R. 92), F.R.C.P., Rule 52.

as this court has recently held.

> "The district court denied appellant's petition without a hearing indicating that it had no jurisdiction by reason of the fact that the sentences in the District Court of Arizona had been completed.
>
> We disagree. One of the purposes of coram nobis is to allow a defendant to attack a conviction notwithstanding the fact that he has completed sentence. United States v. Morgan, supra at 512, 74 S.Ct. 247. A defendant may be harmed by an invalid conviction even after he has served his sentence; i.e., subsequent conviction may carry heavier penalties, and his civil rights may be affected. Coram nobis must be kept available as a post-conviction remedy to prevent 'manifest injustice' even where the removal of a prior conviction will have little present effect on the petitioner. See Mathis v. United States, 369 F. 2d 43 (4th Cir., 1966); see generally, Note, 55 Geo.L.J. 851, 865-70 (1967)." (Holloway v. United States, 393 F. 2d 731, 733 [9 Cir., 1968]).

2. THE DISTRICT COURT WAS CORRECT IN HOLDING THAT DENNIS v. UNITED STATES, 384 U.S. 855 (1966) IS NOT CONTROLLING WITH RESPECT TO BRYSON'S "STANDING" TO ATTACK SECTION 9(h)

The Government argues that, even if the district court had jurisdiction and even if United States v. Brown, 381 U.S. 437 (1965) "calls in question the continued validity of the Douds case as constitutional law" (Br. 9), Bryson -- the chief and indeed almost the sole victim of that judicial mistake -- is in no position to challenge the disabilities under which he now suffers as a result thereof. It says that because, in Dennis v. United States, 384 U.S. 855 (1966), the court refused to accord "standing" to an attack on section 9(h) [by a group of defendants differently situated], such standing may not be

accorded here to Bryson.

Bryson asserted below, first, that his case was distinguishable from that of the Dennis defendants; and, second, that since he was attacking the 9(h) conviction collaterally, not directly as the Dennis defendants did, different considerations apply to the question of standing. Because the district court had no difficulty in distinguishing Dennis (and rightly so), it had no occasion to consider the second ground urged by Bryson. We think it is undeniable that the judgment below may properly be based either on the ground adopted by the district court, or on the alternative ground mentioned.

(a) Dennis v. United States, 384 U.S. 855, supra, is distinguishable from the case at bar

Dennis, as both the Government and the district court recognized (each citing the majority opinion), involved the crime of "conspiracy" to violate 18 USCA 1001 (BR. 9; R. 84-85). That fact in itself constitutes a decisive ground of distinction between Dennis and this case.

> "It is the entire conspiracy and not merely the filing of false affidavits, which is the gravamen of the charge." (384 U.S. 855, 860)

Here there is no "conspiracy", "entire" or otherwise; here there is "merely [a charge of] the filing of [a] false affidavit. ."; here there was not, as there was in Dennis, a "conspiracy, cynical and fraudulent" (384 U.S. 855, 865). Here, the district court found that Bryson, unlike

the Dennis defendants, "at all times denied the falsity of his affidavit" (R. 9) and that Bryson, unlike the Dennis defendants, was acquitted by the jury of the charge of falsifying as to "membership" (R. 9). These findings, supported by the record, are not claimed to be "clearly erroneous" (F.R.C.P., Rule 52) and therefore are to be taken as true on this appeal.

In Dennis, the gravamen of the charge was that dedicated Communists, acting at the behest of the party, conspired falsely to pretend to leave it, while in fact remaining within it (384 U.S. at 859); it was this conduct on their part that resulted in a forfeiture of their standing to challenge 9(h). Here, the whole of the case is that a trade unionist who was not a Communist Party member [7] was punished for the mistake of not knowing the meaning which the courts would ultimately attach to the word "affiliation".

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7 / This court had occasion to pass upon Bryson's character at the time of an application for bail on appeal. It found from the record that

> "It appears that Bryson has no prior record of convictions of any offenses, felony or misdemeanor. For many years of his life he was an American merchant seaman, subject to the jurisdiction of the United States Coast Guard; at no time was he ever charged or convicted of any violation of the rules or regulations of the United States Coast Guard. In all respects whatsoever, save and except for the conviction hereinabove mentioned, Bryson's record of conduct has been and is without blemish.
>
> * * * *
>
> Coupled with this there are of record in the files of this action statements of a large number of responsible citizens of California to the effect that Bryson was a reliable and dependable person, such elements in his character being required to be considered by the last phrase of 46(c), 'the character of the defendant.'" (Bryson v. United States, 223 F. 2d 775 at 777 [1955]).

The distinction between cynical, lying conspirators who engaged in a "voluntary, deliberate and calculated course of fraud and deceit" (Dennis v. United States, supra, at 867) and Bryson who, at most, mistook, while relying on legal advice (R. 77,85), the significance of the amorphous term "affiliation", is of paramount importance. As the district court observed, "standing is not a rigid concept. . .And it is well it is not." (R. 86). The differences between Bryson and those who engaged in the deliberate, conspiratorial course revealed by the Dennis record are of such dimension as to render the Government's reliance on Dennis untenable. The district court was amply justified in reaching the conclusion that "the rule of Dennis does not strip Bryson of standing to attack the constitutionality of Section 9(h)" (R. 87).

(b) Bryson has "standing" in this collateral proceeding to invoke the unconstitutionality of section 9(h)

Dennis v. United States, 384 U.S. 855 (1966), was not a case arising under section 1651(a) or section 2255, therefore its strictures against lying conspirators have no relevance at all to post-conviction proceedings. Bryson's posture here is in no sense the same as that of the defendants in Dennis. Unlike them, he does not seek relief upon the ground that an unconstitutional statute forbids prosecution. Prosecution has already occurred; the sentence has been imposed; most of it has been served; and what remains of it, together with the stamp of legality of the conviction, is what he seeks

to remove. Appellee is not restricted by considerations whose relevance ended with the termination of the main trial. His right presently to invoke the unconstitutionality of 9(h) is not impaired by what the jury did at the trial.

If the fact of conviction, without more, were to be deemed tantamount to a finding of such "dishonesty" or "fraud" as to disqualify Bryson from obtaining relief now, sections 2255 or 1651(a) would never be available to any defendant who had been found guilty despite his denial of guilt. No case holds (nor does the Government cite any, for it does not even deal with this point) that a defendant's unbelieved assertion that he was innocent of wrongdoing, operates to deprive him of the right thereafter to attack the conviction, the sentence, or the statute under which he was tried. It has never been held that while post-conviction relief is available where the offense charged was murder or bank robbery or violation of the narcotics law, an opposite rule governs convictions involving fraud, dishonesty, or the like. The very text of the post-conviction relief statutes rebuts any such supposition, and the cases amply prove the point.

The fact that the offense involved was mail fraud, did not prevent a disposition on the merits under 2255 in Kloian v. United States, 349 F. 2d 291 (5 Cir., 1965), cert. den. 384 U.S. 913. The same principle obtained where the charge was extortion (Stirone v. United States, 341 F. 2d 253 [3 Cir., 1964], cert. den. 381 U.S. 902). Even the fact that the

defendant had been convicted of a conspiracy, has been held to present no barrier to his right to receive post-conviction relief (United States v. Sobell, 314 F. 2d 314 [2 Cir., 1963]). In this Circuit, the rule is the same. Kuhl v. United States, 370 F. 2d 20 (9 Cir., 1966).

Clearly, it is the function of post-conviction procedures to bring such matters to the attention of a court and to seek redress from a miscarriage of justice. (Sunal v. Large, 332 U.S. 174 [1927]; Fay v. Noia, 372 U.S. 391 [1962]; Sanders v. United States, 373 U.S. 1 [1963].

3. SECTION 9(h) WAS UNCONSTITUTIONAL

Inasmuch as the district court had jurisdiction to hear, and Bryson had standing to urge, the claim that 9(h) was unconstitutional, we turn now to a consideration of the merits of that claim.

The district court held that 9(h) was unconstitutional because it violated both the bill of attainder clause of the federal constitution and its first amendment.

As to the bill of attainder point, the district court said:

> "The Constitution seeks to avoid the evil that inheres when a legislature can punish without a judicial trial offering procedural safeguards and requiring a finding that the specific individual being punished does indeed constitute the danger sought to be prevented. In short, then, bills of attainder are pernicious because legislative classifications may include persons whose conduct is not a danger which may constitutionally be punished. The assumption of §9(h) was that all communists were dangerous as unim

officials. Section 9(h) applied to the most docile communist even though he held no illegal aims. No judicial trial permitted a member or affiliate to show that he was not a threat to the national economy. He was automatically swept within the legislative class and punished by administrative sanctions. That is the evil of a bill of attainder." (R. 88)

As to the first amendment point, the district court said:

> "Membership[8] alone in a political party is constitutionally not a fact which can be legitimately proscribed. More than membership is required. 'Specific intent' is required -- a specific intent or belief in the illegal purposes of the group. Knowledge of the group's aims is not alone sufficient. Membership or less was deemed enough for a conviction in petitioner's case. 243 F. 2d at 839; 238 F. 2d at 663. The concept now frequently used to describe oaths and statutes which apply regardless of specific intent of the person touched by the law is 'overbreadth'. That is to say that statutes affecting mere members of political organizations are overbroad in that they punish people who are not a constitutionally punishable danger. Unless a member has an unlawful intent himself, he is not a person who constitutes a clear and present danger to the national security or economy. That is why a statute is said to be overbroad. Guilt by association may not be tolerated in a free society: '[L]egislation which sanctions membership unaccompanied by specific intent to further the unlawful goals of the organization. . .or which is not active membership violates constitutional limitations.' Keyishian v. Board of Regents, 385 U.S. 589, 608 (1967)." (R 89 ; emphasis added)

On both scores, the district court was correct.[9]

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8 / We remind once more that Bryson was acquitted of the charge of falsely denying membership. The conviction rested solely on a charge that he had falsely denied having sustained the relationship of "affiliation".

9 / Compare Brown v. U.S. (9 Cir., 1964), where this court held §504 to violate the First and Fifth Amendments (334 F.2d 488).

(a) Section 9(h) was a bill of attainder

If one applies to 9(h) the tests laid down not only in United States v. Brown, 381 U.S. 437 (1965), which was decided after 9(h) was enacted, but also in cases like Cummings v. Missouri, 4 Wall. 333 (1867); Ex parte Garland, 4 Wall. 356 (1867); and United States v. Lovett, 328 U.S. 303 (1945), which preceded the enactment of 9(h), it is clear that 9(h) was an unconstitutional bill of attainder. Those tests establish that a law is unconstitutional as a bill of attainder if it is a legislative act which imposes punishment upon an easily ascertainable class without a judicial trial. That 9(h) did just that, is too obvious for extended comment, notwithstanding the main opinion in American Communications Association v. Doud, supra.

The Government's contention that 9(h) is distinguishable from section 504 (held unconstitutional as a bill of attainder in Brown) because the former was merely a "restriction" while the latter was a "prohibition" (Br. 15-16), is utterly fallacious. For bill of attainder purposes, "punishment" has never meant, as urged by the Government here, only "immediate criminal sanction" (Br. 17). See Garland, Cummings, Lovett and Brown, supra. Moreover, section 9(h) invoked the criminal sanctions of 18 USCA 1001 -- criminal sanctions that were, in fact, applied against Bryson. The fact that the Taft-Hartley law utilizes the penal provisions of the criminal code, rather than having penal provisions separately written into it, is no meaningful basis for any distinction between section 9(h)

and section 504. Thus, in practical effect, there is no distinction between the status in which Bryson and the defendant in Brown found themselves.

The difference in the results of these cases is that in 1950 the court in Douds, by "misreading" Lovett (United States v. Brown, 381 U.S. 437, 460) and by disregarding the "spirit" of such decisions as Cummings and Garland (United States v. Brown, supra, at 447), came to erroneous conclusions concerning the validity of the statute, whereas in Brown, the court in 1965 reverted to the true and original meaning of the bill of attainder clause.

(b) Section 9(h) violated the First Amendment

The district court held that 9(h) was "overbroad" in that it swept into its ambit all "affiliates" of the Communist Party irrespective of whether any of them (by virtue of their "affiliation", as distinguished from "membership") had the personal specific intent to engage in, or had the personal knowledge that the Communist Party engaged in, any activity which Congress could constitutionally prohibit. Its decision was soundly based on the most recent cases dealing with this issue. (Keyishian v. Board of Regents, 385 U.S. 589 [1967]; Elfbrandt v. Russell, 384 U.S. 11 [1966]; Dombrowski v. Pfister, 380 U.S. 479 [1965]; Aptheker v. Secretary of State, 378 U.S. 500 [1964]; and Scales v. United States, 367 U.S. 203 [1961]). Since the date of the order below, the Supreme Court has decided that a statute precluding employment in a defense facility on the ground

of membership in the Communist Party, was an unconstitutional abridgment of the right of association guaranteed by the First Amendment. United States v. Robel, 389 U.S. 258 (1967).

All the foregoing cases were decided after Douds, and to the extent that Douds does not reflect their doctrine, it is also "obviously overruled" by necessary implication (United States v. Brown, 381 U.S. 437, 464 [1965]).

The Government's attempted distinction of Aptheker v. Secretary of State, supra, on the asserted ground that in some fashion the freedom to serve as a union officer is less of a "constitutionally protected liberty" than the right to travel (Br. 21) cannot withstand analysis. In the first place, the rights or freedoms of American citizens cannot arbitrarily be choked off in such a way. Who in the executive branch of Government is qualified to say that one right is more constitutionally protected than another? We have seen that United States v. Robel, 389 U.S. 258, holds employment at a defense facility is a right protected by the First Amendment (at 268); can a rational distinction be made between such employment and the job of a trade union officer? And if so, would not the latter seem to be entitled to greater freedom from governmental restraints?

Moreover, the Government's reservations in reference to the protections that attach to the holding of trade union office, seem unrealistic in the extreme. Of trade union membership, the Supreme Court has said that it

> "cannot be seriously doubted that the First Amendment's guarantees of free speech, petition and assembly give railroad workers the right to gather together for the lawful purpose of helping and advising one another in asserting the rights Congress gave them in the Safety Appliance Act and in the Federal Employers Liability Act, statutory rights which would be vain and futile if the workers could not talk together freely as to the best course to follow. . . .The Brotherhood's activities fall just as clearly within the protection of the First Amendment. And the Constitution protects the associational rights of members of the union precisely as it does those of the NAACP." (Brotherhood of Railroad Trainmen v. Virginia ex rel. Virginia State Bar, 377 U.S. 1, 5, 8 [1964]).

Manifestly, the First Amendment rights of union members to select their own officers, with assurance that the choice will be respected, would come to naught if intrusions were permitted under the guise of action against their officers only. "The right of members to consult with each other in a fraternal organization necessarily includes the right to select a spokesman from their number who could be expected to give the wisest counsel." (Brotherhood of Railroad Trainmen v. Virginia ex. rel. Virginia State Bar, supra, 377 U.S. 1, 6 [1964]).

In the second place, it is not merely a question that turns on the particular right or freedom being asserted, but rather whether there is constitutional power, by legislative judgment, to "restrict" or to "prohibit" it. It is the unconstitutional exercise of governmental power that is being attacked; this does not depend upon how high in the hierarchy of rights the Government chooses to regard the particular

activity, i.e., trade union leadership vs. foreign travel. Once the Government attempts to inhibit a citizen from peacefully exercising a First Amendment right -- to travel or to associate with others in a trade union (and to be elected to leadership in such a union, as were both Brown and Bryson) -- then the doctrine of overbreadth relied upon by the district court comes into play. That clearly is the teaching of Keyishian, Elfbrandt, Dombrowski, Aptheker, Scales and Robel, supra.

Nothing in the Government's attempted distinction of these cases undermines the validity of the district court's opinion. Indeed, we note the Government's admission that 9(h) suffered at least from "one of the vices of the statute held unconstitutional on its face in Aptheker: it "'rendered irrelevant the member's degree of activity in the organization and his commitment to its purpose.' (387 U.S. at 510. . .)" (Br. 21). We also note the Government's concession that "in some of the cases cited" by the district court (specifically Keyishian and Dombrowski, supra) "the wide sweep of the language" justified a conclusion that First Amendment rights were being violated (Br. 23, n. 17).

It is clear that 9(h) was unconstitutional not only as a bill of attainder, but also as a direct infringement on First Amendment rights.

4. BRYSON MAY PRESENTLY AVAIL HIMSELF OF THE UNCONSTITUTIONALITY OF SECTION 9(h)

The Government argues (Br. 12-13) that to apply the ruling in Brown "retroactively" to Bryson's situation might "lead to developments in the law of the finality of judgment, which we cannot even imagine". It suggests that, to accord Bryson the benefit of the most recent pronouncement of the Supreme Court on bills of attainder will, in some undefined way, unsettle or upset legal stability.

One reply that might be made, is to remind the Government that the ends of justice are not always served by mechanical adherence to "stability". The doctrine of "stare decisis is not, like the rule of res adjudicata, a universal inexorable command" (Burnet v. Coronado Oil & Gas Co., 285 U.S. 393, 405 [1932], dissenting opinion of Mr. Justice Brandeis). In the light of experience and fresh opportunity for reflection, the Supreme Court has not infrequently overruled its constitutional decisions. (For a list of such cases, see dissenting opinion of Mr. Justice Brandeis in Burnet v. Coronado, etc., supra, at pp. 407, n.2, and 409, n.4). More than a century ago, Chief Justice Taney stated his position that

> "it be regarded hereafter as the law of this court, that its opinion upon the construction of the Constitution is always open to discussion when it is supposed to have been founded in error, and that its judicial authority should hereafter depend altogether on the force of the reasoning by which it is supported." (Smith v. Turner, 7 How. [48 U.S.] 283, 470 [1849]).

Clearly, then, the argument based upon "stability" loses its force when submission to it results in the perpetuation of past error. It does not follow, of course, that all corrective decisions must automatically be given a retroactive application. We do not ask the court to close its eyes to the practical effects that retroactivity may entail, and doubtless the courts must weigh conflicting considerations in particular types of cases, granting retroactive application in one and denying it in another. (Compare Linkletter v. Walker, 381 U.S. 618 [1965] and Johnson v. New Jersey, 384 U.S. 719 [1966] with Roberts v. Russell, 391 U.S.____, 36 U.S.L.Wk 3472 [June 10, 1968].) Admittedly, the nature of the constitutional right involved is a factor of prime significance.

In our case, the constitutional right urged is of very staunch caliber; it does not, because it cannot, depend upon such fortuitous circumstances as whether counsel does or does not make the appropriate objections at trial (we did, however, at every stage of Bryson's criminal case, challenge 9(h) as an unconstitutional bill of attainder, as well as being violative of First and Fifth Amendment rights); nor does it change in content so as to reflect judicial efforts to improve or elevate the enforcement of laws in our country. It is a right which is not even susceptible to the practical transformations that come into existence out of the everlasting clash between the need to safeguard the security of Government, and the need to protect inviolate the right to express opposition to what Government is

doing. For in this case, the constitutional right of which Bryson was deprived is contained in the original Constitution itself; indeed, in the very first Article, which reads:

> "No Bill of Attainder or ex post facto law shall be passed." (Article I, Section 9, Clause 3)

This constitutional provision, unlike some others, has had no history that might be called hectic or volatile. The cases decided under it can be numbered on the fingers of one's hands; and save for the decision in Douds, all the cases support the applicability to Bryson of the protections of Article I. "Never before has this court held that the Government could for any reason attaint persons for their political beliefs or affiliations. It does so today." (Mr. Justice Black, in dissent, A.C.A. v. Douds, 339 U.S. 382, 449 [1950])

The Government's argument concerning "stability" was likewise made before the district court. That court concluded that the considerations urged by the Government were inapplicable to this case, for one thing because no threat of mass relitigation exists, inasmuch as section 9(h) has long since been repealed; for another, because even in this case, the result of granting relief to Bryson will not entail a retrial of the criminal charges. A decision that 9(h) is unconstitutional as applied to Bryson bars all further litigation. That being so, there seems to be little reason for this court to concern itself with what, in final analysis, is little more than a scarecrow. It is enough that, in this case

and on this record, the fears of the Government are groundless.

CONCLUSION

For the foregoing reasons, the order setting aside the conviction and sentence should be affirmed.

DATED: August 19, 1968
San Francisco, California

Respectfully submitted

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

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CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief for Appellee was this date mailed to the following: (3 copies)

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